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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 286

SINCLAIR REFINING COMPANY,
Appellant,

vs.

STATE OF LOUISIANA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION.

ROY T. OSBORN,
V. R. TOMLINSON,
ALFRED McKNIGHT,
WILLIAM A. PORTEOUS, JR.,
F. CARTER JOHNSON, JR.,
Counsel for Appellant.

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APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION.

MAY IT PLEASE THE COURT:

Appellant in its Petition for Appeal and Assignment of Errors presented several Federal questions involving the validity of the Louisiana taxing statute in the light of the Constitution of the United States, namely:

(1) Denial to appellant of due process of law as guaranteed by the 14th Amendment to the Constitution of the United States;

(2) Denial to appellant of equal protection of the laws under the 14th Amendment;

(3) The statute as construed and applied permits the taxation of imports for sale and losses in imports for sale to the United States Government; and

(4) The statute as construed and applied by the Supreme Court of Louisiana constitutes a direct and undue burden upon interstate commerce in violation of Article 1, Section 8, Cl. 3 of the Constitution of the United States.

Appellant also attacks the validity of the procedural statute, Act 14 of the 2nd Extra Session of 1935, under which the summary action appealed from was instituted, on the ground that such statute denies to appellant the due process of law and the equal protection of the laws as guaranteed under the 14th Amendment to the Constitution of the United States.

Appellee has filed a statement opposing the jurisdiction of this Honorable Court as to only two of the grounds asserted by appellant:

(1) Appellee asserts that appellant did not seasonably present in the courts below its claim that the act as construed and applied imposed a direct and undue burden on interstate commerce in violation of the commerce clause of the Constitution of the United States, as aforesaid. The point presented is that appellant first raised the unconstitutionality of the statute in this respect in a motion for rehearing following the rendition of the decision and judgment of the Supreme Court of Louisiana. It is not claimed by appellee that the Federal question involving the commerce clause of the Constitution is not a substantial one.

(2) Appellee asserts that the Federal question relating to the validity of the procedural statute, Act 14, is not substantial; that appellant has not been injured thereby, and this Court therefore should not assume jurisdiction of this question.

Inasmuch as the statement opposing jurisdiction does not assert or claim that the Federal questions presented by ap-

pellant, other than the last two listed, are not substantial and are not properly before this Court for determination, we believe that we are safe in assuming that the opposing statement concedes such questions to have been properly raised, to be substantial in their nature, and to be properly before the court for consideration. We therefore will confine this reply to the points presented in appellee's statement opposing jurisdiction.

The Historical Origin of This Case.

The present Constitution of Louisiana became effective in 1921. In 1928 an amendment to the Constitution of 1921 was adopted, known as Article 6, Section 22, which gave the Legislature authority to collect gasoline taxes not to exceed 4¢ per gallon. That portion of the Constitution dealing with the tax on gasoline reads as follows:

> "On gasoline, benzine, naphtha and other motor fuels, as defined by law, *when sold, used or consumed in the State of Louisiana,* there shall be levied a tax not to exceed four cents (4¢) per gallon, to be collected as prescribed by law." (Italics ours.)

After the constitutional amendment referred to above was adopted, the Legislature, in an extra session, adopted Act 6 of the Extra Session of 1928, which was approved by the Governor on December 18, 1928. The act was amended by Act 8 of 1930, Act 16 of 1932 and Act 34 of 1934. The title in part reads as follows:

> " 'To provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel *sold, used or consumed in the State of Louisiana for domestic consumption,* as authorized by paragraph A, Section 22, Article VI, of the Constitution of Louisiana, of 1921. * * *' " (Italics ours.)

The levying clause in Section 1 of Act 6 of the Extra Session of 1928 reads as follows:

> "'Section 1. Be it enacted by the Legislature of Louisiana, That there is hereby levied a tax of four cents (4¢) per gallon on all gasoline, or motor fuel, *sold, used or consumed in the State of Louisiana for domestic consumption, to be collected as hereinafter set forth.*'" (Italics ours.)

Shortly after the gasoline tax law became effective, Honorable E. A. Conway, Supervisor of Public Accounts, in his official capacity as such, ruled that for the purpose of the 3% allowance, total sales would be the equivalent of total receipts. His letter on the subject reads as follows:

"State of Louisiana.

"Office of

"Supervisor of Public Accounts,

"Baton Rouge, La.

March 5, 1929.

"Louisiana Oil Refining Corporation,
"Shreveport, Louisiana.

"GENTLEMEN:

"With reference to our correspondence regarding the 3% allowance for losses in handling motor vehicle fuel, and particularly to our letter of February 25, 1929, and reply of your attorney, Mr. H. C. Walker, Jr., under date of February 27th, and confirming conference between the writer, Mr. H. C. Walker, Jr., held on the evening of March 4th, beg to advise as follows:

"That for the purpose of the 3% allowance under Act 6 of the Extra Session of 1928, the office of the Supervisor of Public Accounts *will construe total sales as the equivalent of receipts,* and will accept for the purpose of such deduction, reports of total sales as total receipts; that is, you may base your 3% allow-

ance of the total sales for the calendar month (sales and receipts being treated as equivalents).

"There is some difference of opinion as to the meaning and application of paragraph 4 of Section 1 of Act 6 of the Extra Session of 1928, and under our interpretation of the Act, it is the desire of this department to collect 4¢ per gallon on all gasoline, etc., sold, used or consumed in the State of Louisiana, less 3% allowance for losses in handling; and in order to offer you the protection deemed necessary by your attorney, this letter is directed to you at his request. (Italics ours.)

"Yours very truly,

"E. A. CONWAY,
"*Supervisor of Public Accounts.*"

"EAC:VP."

For the purpose of the 3% allowance, the State construed total sales as the equivalent of receipts. On the doctrine of contemporaneous construction, the aforesaid letter of Honorable E. A. Conway was given the effect of law by the Supreme Court of Louisiana in the case of *State* v. *Standard Oil Company of Louisiana*, 190 La. 338, 182 La. 531, which case was decided on May 30, 1938.

Immediately after the adoption of Act 6 of the Extra Session of 1928, the State of Louisiana began an extensive road building program. It was ascertained that a State tax of 4¢ a gallon on gasoline was not sufficient, and in 1930, the Constitution was further amended to provide for an additional tax of 1¢ a gallon on gasoline, making the total State tax 5¢ a gallon. Article 6-A of the Constitution is self operating and provides for the 1¢ a gallon tax on gasoline and contains fourteen sections. Section 1, in part, reads as follows:

"In addition to the tax of four cents per gallon levied by Act 6 of the Special Session of the Legislature of Louisiana of the year 1928 under authority of Article

VI, Section 22 of the Constitution of Louisiana on gasoline or motor fuel, a tax of one cent per gallon is hereby levied on all gasoline, benzine, naphtha, or other motor fuel, as herein defined, *when sold, used or consumed in the State of Louisiana for domestic consumption, to be collected as hereinafter set forth.*" (Italics ours.)

The Constitution provides that dealers may furnish bond and furnish a monthly report to the State within twenty days after the expiration of each monthly period covering all gasoline "sold, used or consumed within the State during the preceding month". The monthly report printed by the State of Louisiana, in accordance with the gasoline tax law and the Constitution, *provides for the payment of the tax, less the allowance of 3% on the net taxable gallonage sold, used or consumed in the State.* The form furnished by the State of Louisiana is found in the case of *State* v. *Standard Oil Company of Louisiana* (*supra*) on page 536, and reads as follows:

"During the Month of —— 19—.

"Sales in the State of Louisiana.

"Kind of Motor Fuel	Total Gallons Sold	State Tax Four Cents per Gallon
"Gasoline		$
"Other Motor Fuel		$
"Less Allowance 3%		$
"Totals		$

"The allowance of 3% is based on the net taxable gallonage sold, used or consumed in the State."

It is to be observed the tax is to be paid only on net taxable gallonage sold, used or consumed in the State.

Article 6-A, Section 7, provides for the powers and duties of the Supervisor of Public Accounts (now Collector of

Revenue) and for suits for enforcement of the act, and reads as follows:

"Section 7. Powers and duties of Supervisor of Public Accounts—Suits for enforcement of act—The Supervisor of Public Accounts shall have the power to require any person, firm, corporation or association of persons engaged in the handling, sale or distribution of gasoline, benzine, naphtha or other motor fuel as described herein, to furnish any additional information by him deemed to be necessary for the purpose of collecting said tax, and for said purpose shall have the authority to examine the books, records and files of such persons, firms, corporations, or associations of persons, and, to that end, shall have the power to examine witnesses, and if any such witnesses shall fail or refuse to appear at the request of the Supervisor of Public Accounts, or refuse access to the books, records or files, said Supervisor of Public Accounts shall certify the facts and the names of witnesses so failing and refusing to appear, or refusing access to the books or papers, to the District Court having jurisdiction of the party, a copy of which shall be sent to the Governor; and said Court shall thereupon issue a summons to the said party to appear before the said Supervisor, or his assistant, at a place designated within the jurisdiction of said Court, on a day to be fixed, to be continued as occasion may require, and give such evidence and open for inspection such books and papers as may be required for the purpose of ascertaining whether or not the return so made is a true and correct return as herein required, and whenever it shall appear to the Supervisor that any such person, firm, corporation or association of persons engaged in the handling, sale or distribution of gasoline, benzine, naphtha or other motor fuel, within the meaning of this Article, has unlawfully made an untrue or incorrect return as herein provided, the Supervisor shall correct the return and shall compute the said tax on same and so certify same to his department as being the amount actually due and owing, and the Supervisor shall concurrently

notify such person, firm, corporation or association of persons of such facts; and in the event that such person, firm, corporation or association shall not within five days after such notification, make a correct return and pay the full amount in the name of the State, without deposit or advance costs, enter suit against such person, firm, corporation or association of persons for the amount due, together with such penalties as are provided in this Article. Such suits shall be by rule to show cause within five days why payments should not be made, and shall be tried by preference and may be tried out of term time and in chambers. (Added by, Acts 1930 (E. S.), No. 1, Section 7, adopted, November 4, 1930.)."

The above language reads identically like Section 7 of Act 6 of the Extra Session of 1928, as amended, which levies the 4¢ a gallon tax.

Act 6 of the Extra Session of 1928, as amended, which levies the 4¢ gasoline tax, provides for the tax on the sale, use and consumption in the title and in Section 1, which levies the tax. Section 4 of the aforesaid act provides that the tax shall be paid by the dealer only on gasoline *actually sold, used or consumed,* and reads as follows:

"It is hereby made compulsory for each and every 'dealer' under the provisions of this Act to furnish satisfactory surety bonds as above provided, before engaging in the business of 'dealer' in gasoline or motor fuel. *Said bond having been furnished and accepted, as provided herein, the dealer furnishing same shall be required to pay the tax at the time of making reports to the Supervisor of Public Accounts, as herein required, only on such gasoline or motor fuels ACTUALLY sold, used, or consumed in this State,* during the period for which said reports are made and in which event the tax herein levied shall become delinquent the day after the date herein fixed for the filing of said reports." (Italics and capitals ours.)

The act further provides, as does Article 6-A of the Constitution, that the tax is not to be paid by the dealer (Sinclair Refining Company) until twenty days after the month in which the gasoline was sold.

The gasoline tax law of Louisiana has been construed on eight occasions by the Supreme Court of Louisiana, and in three cases by the United States District Court for the Eastern District of Louisiana, and in all of these cases it has been held that the gasoline tax law of Louisiana levied an excise tax and was due on sale, use and consumption, and at no time has it ever been held, until the decision in this case, that the tax was due on imports.

State v. *Johnson*, 173 La. 669, 138 So. 503, 506;
State v. *City of Monroe*, 177 La. 983, 149 So. 541;
State v. *Cedar Grove Refg. Co., Inc.*, 178 La. 810, 152 So. 531, 533;
State v. *Strother*, 179 La. 354, 154 So. 22;
State v. *Tri-State Transit Co.*, 179 La. 811, 155 So. 233;
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Magnolia Petroleum Company v. *Hugh M. Wilkinson et al.*, 21 Fed. Supp. 771;
Shell Petroleum Corp., Tex. Co. and Magnolia Petroleum Corp. v. *H. M. Wilkinson et al.*, 21 Fed. Supp. 780;
The Texas Company v. *Hugh Wilkinson et al.*, 21 Fed. Supp. 771.

It will be readily observed that Louisiana has levied an excise tax and in an unbroken line of decisions it has been uniformly held *that the tax was on sale, use and consumption.*

On January 1, 1939, a constitutional amendment providing that all taxes due the State would prescribe within three years, became effective. On the late afternoon of December 31, 1938, just prior to the effective date of the new constitutional amendment providing that taxes due the State would prescribe within three years from the date on which they were due, the State of Louisiana, without complying with Section 7 of Article 6-A of the Constitution of Louisiana, which deals with the 1¢ per gallon gasoline tax, or without complying in any manner with Section 7 of Act 6 of the Extra Session of 1928, as amended, filed this suit.

The Issues Involved and How They Arose.

The State of Louisiana in its petition claimed during the period from January 1, 1935, to June 1, 1938, that appellant *sold, handled, distributed or used within the State of Louisiana* 1,591,862.30 gallons of gasoline upon which it failed to pay the State excise taxes, and that 97% of this quantity was subject to be taxed under the taxing statutes herein referred to. It alleged alternatively that all gasoline imported into the State is presumed to have been used, sold, distributed, handled, or consumed within the State, and that if appellant contended any of the alleged taxable quantity was not in fact sold, used, distributed, handled or consumed within the State that appellant had failed and neglected to make a satisfactory showing or to satisfactorily account therefor.

Appellant, required to file exceptions and answer within ten days under the procedural statute in this summary proceeding, filed exceptions and likewise answered to the merits within the required time. It alleged that it paid the required taxes on all gasoline sold, used or consumed in the State of Louisiana during the period involved, less an allowance of 3% provided by statute. It alleged that after giving

effect to its opening and closing inventories, its receipts and sales, there was a loss amounting to 1,646,551 gallons in the total quantity imported in the State of Louisiana during the period (which included imports for export in foreign and interstate commerce as well as imports for domestic sale, use or consumption), and this loss occurred prior to export (on the quantity exported) and prior to sale and delivery of the quantity sold, used or consumed in the State of Louisiana. It alleged that the quantity so lost was never at any time sold, used or consumed in the State of Louisiana and this loss more than accounted for the quantity claimed by the State to be taxable. It thereby accounted for all gasoline imported into the State of Louisiana.

No issue was framed by the pleadings whereby any tax was claimed or asserted other than on the basis that the gasoline sought to be made subject to the tax had been sold, handled, used or consumed within Louisiana. Reference to the pleadings amply substantiate the foregoing statement. At no time was it suggested that any tax was to be based upon the amount of the dealer's importations. Under the practice in Louisiana, the issues framed in the Trial Court are the only issues properly before the Supreme Court for consideration on appeal, no assignments of error being required.

Upon a trial of the case the evidence disclosed affirmatively and conclusively that appellant had reported during the period and paid a tax upon all gasoline or motor fuel sold, used or consumed by it within the State, save and except a small quantity upon which it confessed judgment and which is not here involved. Its own witnesses as well as the witnesses for the State conceded this to be true. The State's representatives also conceded that no tax was due and payable upon gasoline or motor fuel which was lost prior to sale, use or consumption, which is manifested by the following question asked by the Trial Court to Mr. John

F. Boyle, the representative of and testifying on behalf of the Collector of Revenue:

"By the Court:

"Q. Mr. Boyle, suppose for instance, a thousand gallons of gasoline were shipped into Louisiana to a bonded dealer, say on the first of a month, and during the month only 990 gallons were sold, ten gallons having been lost. Would the tax be paid on the 990 gallons or on the thousand gallons shipped into the state?

"A. The practice has been it would be paid on the 990 gallons" (R. 76).

The undisputed evidence disclosed that appellant imported into its Westwego and Destrehan terminals in the State of Louisiana during the period involved 177,457,526 gallons of gasoline and of this it actually exported in interstate and foreign commerce 131,702,508 gallons. Appellant by its evidence at the trial likewise accounted for its inventories on hand within the State at the beginning of the taxable period and for the relatively small amount of gasoline received within the State from all other sources. It then accounted for its sales within the State and for its inventories on hand at the end of the taxable period. The larger portion of the gasoline or motor fuel remaining at the Westwego and Destrehan terminals after deducting the exports in foreign and interstate commerce was shipped by appellant to its bulk plants for sale. It also received into its bulk plants a certain quantity of gasoline from other sources of supply. It actually handled through its bulk plants in the State 54,837,721 gallons of gasoline and its gross sales therefrom amounted to 54,189,720.6 gallons. The difference between the last two stated amounts was not sold, used or consumed within the State of Louisiana but was on hand at the end of the taxable period and represented appellant's closing inventory. No tax is claimed upon the closing inventory. The entire tax

less 3% allowance according to the undisputed evidence was paid upon this gallonage so sold, save and except upon a small quantity of 1,666 gallons, which is not here involved. The undisputed evidence disclosed that there was a loss of 1,491,674 gallons of gasoline at appellant's Westwego and Destrehan terminals in the total quantity of gasoline imported into these terminals during this period. The gasoline was lost through evaporation and temperature changes prior to being moved from the terminals. The loss occurred between the time the gasoline was actually received into the terminals and before it was exported in interstate or foreign commerce or shipped locally to appellant's bulk plants. The loss was in the total quantities imported for all purposes, including the quantity imported for foreign and interstate commerce, as well as the quantity imported for domestic sale, use or consumption. In addition thereto there were losses during the taxable period at appellant's bulk plants through evaporation, temperature changes, robbery, spillage and other causes, aggregating 119,433 gallons. These losses occurred prior to actual sale, use or consumption. The losses referred to were not in the quantities actually exported or actually sold, but accrued in the total quantities imported prior to export and prior to sale, use or consumption within the State. The total losses thus accounted for aggregated 1,611,107 gallons. The quantity of 1,591,862.30 gallons referred to in the State's petition and made the basis of the State's claim was in fact not sold, used or consumed within the State of Louisiana but constituted a part of the quantity aggregating 1,611,107 gallons which was lost from the causes above stated and was not sold, used or consumed within the State.

Upon the record thus made the trial court found that appellant had satisfactorily accounted for all of its imports of gasoline during the taxable period, that it had paid the required tax less a statutory allowance of 3% upon all gasoline

sold, used or consumed by it within the State, save and except upon a small quantity aggregating 1,666 gallons, and that under the taxing statutes it was not required to pay a tax upon gasoline lost under the circumstances shown by the evidence and that such statute only required payment of the tax upon that gasoline which was actually sold, used or consumed within the State, less a 3% allowance. Upon such findings and conclusions the trial court denied a recovery to the State of Louisiana upon any part of the quantity of gasoline involved in this claim, save and except upon the small quantity of 1,666 gallons upon which appellant admitted a tax to be due.

Upon appeal the Supreme Court of Louisiana reversed the judgment of the trial court and rendered judgment against appellant for $120,438.59 which consisted of the following items:

(a) A State tax of 5¢ per gallon on 1,544,105.27 gallons (which quantity of gasoline was included in the losses of 1,611,107 gallons heretofore referred to) amounting to $77,205.26, plus a parish tax of 2¢ per gallon on 699,992 gallons of this quantity amounting to $13,398.44, or a total of $90,603.70. There was added to this a 20% penalty amounting to $18,209.74, making a total tax and penalty of $108,813.44. Ten per cent attorneys' fees aggregating $10,881.34 were applied which made a grand total of $119,694.78.

(b) $611.51 upon tractor fuel or kerosene refunds, plus 20% penalty and 10% attorneys' fees, amounting to $733.81. The trial court's judgment with respect to this item was not appealed from and was therefore sustained and no complaint is here made with respect to this item.

In rendering judgment against appellant for the large item of $119,694.78 the Supreme Court of Louisiana predicated its judgment upon a statutory application and con-

struction which prior thereto was not in issue in the case and upon a statutory construction and application *not claimed by the State of Louisiana* in the pleadings filed in the lower court to which appellant answered in the summary proceeding. The Supreme Court of Louisiana held your appellant was liable to the State of Louisiana not only upon 97% of all quantities of gasoline sold, handled, distributed or used within the State (as claimed by the State of Louisiana in its pleadings) but upon all gasoline *imported into the State of Louisiana for sale, use or consumption,* less a 3% allowance, even though the quantity of gasoline upon which the tax was adjudged to be due was not sold, used or consumed within the State but was lost through spillage, leakage or evaporation after having been imported into the State and prior to sale, use or consumption. *However, the actual effect and application of the decision of the Supreme Court of Louisiana in this case is to require appellant to pay a tax (in addition to a tax upon 97% of the quantity actually sold, used or consumed) upon the loss in its total imports into the State for all purposes, including losses in its imports in interstate and foreign commerce,* in that necessarily the greater portion of the net taxable quantity of 1,544,105.93 gallons added to appellant's tax liability was included in the quantity imported into its terminals for export in interstate and foreign commerce. Only a small part of the loss added to the tax liability was in the quantity imported into the State *for domestic sale, use or consumption.* This is clearly manifested by the fact that 1,491,674 gallons of this quantity were lost at the Westwego and Destrehan terminals, whereas only 119,433 gallons were lost at the bulk plants to which the gasoline was shipped from the terminals for sale within the State.

The mere fact the Supreme Court of Louisiana deducted the actual gasoline and motor fuel exported in interstate

and foreign commerce from the total imports in determining the amount imported for domestic sale, use or consumption does not at all alleviate the burden upon interstate commerce. To have been consistent the Louisiana court should have deducted from the total imports the amounts imported in and for interstate and foreign commerce. In this manner the losses occurring in this class of imports in the time transpiring between actual import and actual export would have escaped the Louisiana tax. As actually applied this loss, which constituted 92½ per cent of the total loss, was added to appellant's tax liability. *The decision and judgment of the Supreme Court of Louisiana goes further in fixing the tax liability of appellant than the rule of law announced by that court and arbitrarily adds to the quantity actually sold, used or consumed within the State the quantity lost in its imports for all purposes, including those imports in interstate and foreign commerce.*

The decision of the Supreme Court of Louisiana was the first time in the progress of the litigation there was drawn in controversy the right of the State of Louisiana to tax the imports of appellant. The right to tax imports had not been asserted by the State in the pleadings filed in the lower court, and was not sustained by the trial court. No occasion to attack the constitutionality of the statute thus construed and applied arose prior to the decision of the Supreme Court of Louisiana. After the decision complained of was rendered by the Supreme Court of Louisiana appellant seasonably applied for a rehearing and asserted among other things as its grounds for rehearing that the Louisiana statute thus construed and applied violated rights and privileges guaranteed under the Constitution of the United States. All of the constitutional points presented in this appeal were presented to the Supreme Court of Louisiana in appellant's application for a rehearing. That was the first occasion or

opportunity which appellant had to present these constitutional objections.

The Federal question involving the validity of the Louisiana Statute in the light of the commerce clause of the Constitution of the United States first became an issue in the case upon the rendition of the judgment and decision of the Supreme Court of Louisiana and was properly raised and is now properly before this Court for consideration.

By its petition for appeal and assignments of error appellant attacks the holding of the Supreme Court of Louisiana sustaining as valid and constitutional the taxing statutes of the State of Louisiana as construed and applied by the Supreme Court of that State. Appellee in its statement opposing jurisdiction admits these assignments of error present a substantial Federal question (see Section 4, pages 15-16, Statement Opposing Jurisdiction) but asserts that this question was presented too late because it was "*not urged in the pleadings and raised for the first time in the application for rehearing*". In support of this proposition it relies upon the decision and holding of the Supreme Court of Louisiana in *State* v. *Great Atlantic & Pacific Tea Co.*, 190 La. 925, 183 So. 219, writ of certiorari denied, 59 S. Ct. 108, wherein it was held that one asserting the unconstitutionality of a law must specifically plead its unconstitutionality.

We concede this to be a correct abstract statement of the law but it has no application here for several reasons. The State of Louisiana by its pleadings in the trial court *did not put in issue the constitutional question here presented.* It did not by its pleadings attempt to construe and apply the taxing statutes in an unconstitutional way. It pitched its case upon *a non-federal question.* The Louisiana statutes had prior to the institution of this summary proceeding been construed purely as excise statutes levy-

ing a tax upon the actual sale, use or consumption of motor fuel within the State of Louisiana as will be hereinafter shown. The State of Louisiana in its petition did not seek to construe and apply the statutes as a tax *upon imports or the right to import.* It asserted simply that the quantity of gasoline which it was seeking to tax *was actually sold, handled, distributed or used within the State* and sought to apply the tax to 97% of the quantity actually sold, handled, distributed or used within the State during the taxable period. By an alternative allegation it sought to avail itself of an alleged statutory presumption wherein it claimed that all gasoline imported into the State was presumptively *used, sold, distributed, handled or consumed within the State* unless satisfactory proof was made to the contrary. *The alternative allegations based upon this alleged statutory presumption went out of the case under the proof* and under the trial court's finding of fact which was not set aside or disturbed by the Supreme Court of the State of Louisiana. It is true that the word "handled" was injected into the phrase used by the State of Louisiana in its petition but it is perfectly clear from the context that the word "handled" was intended to have a synonymous meaning with the words, "sold, distributed and used". At any rate, it is clear that it was not intended by the use of this word to attempt to construe and apply the statutes to all imports, less only the quantity actually exported, so as to render subject to taxation losses accruing in the importation of gasoline or motor fuel for all purposes. It was not asserted or contended by the State of Louisiana in its pleadings that any such losses were subject to be taxed. Appellant joined issue with the appellee upon the facts as alleged and asserted that it had paid all required taxes (after giving effect to the statutory allowance of 3%) upon all gasoline and motor fuel sold, used or consumed by it within the State and accounted for the quantity asserted

by the State in its petition as being sold, used, distributed, handled or consumed within the State as having been lost out of its total imports for all purposes, and asserted that such quantity of gasoline was not sold, used or consumed within the State and therefore not subject to be taxed. The State of Louisiana filed no responsive pleadings claiming such quantity so lost to be subject to the tax and the record discloses that the case was tried in the trial court upon the claims and defenses asserted in the respective pleadings. *Certainly it was not incumbent upon appellant to plead in the trial court the unconstitutionality of a construction or application of a statute which was not even urged or insisted upon by the adverse party, particularly in view of the fact that the statute had not theretofore been so construed and applied by the Supreme Court of Louisiana or any other court in the numerous prior litigation involving the statute.*

The undisputed evidence at the trial disclosed that the State of Louisiana had theretofore only treated the statute as an excise statute and applied it as against actual sale, use or consumption within the State. It had never theretofore been construed or applied as *a tax upon imports.* The representative of the State at the trial testified that the practice was to require the payment of the tax only on actual sales as distinguished from total imports (R. 53). The Supreme Court of Louisiana, however, placed a construction upon the statute and applied it in a manner *not even pleaded by the State of Louisiana in its petition.* The trial court disposed of the case *upon a non-federal ground.* The Supreme Court of the State of Louisiana itself for the first time in the process of the litigation injected a federal question into the case by construing and applying the statute in the manner it did and appellant presented *at its very first opportunity* in its petition for rehearing the unconstitutionality of the statute as construed, applied and enforced

by the Supreme Court of Louisiana. The Supreme Court of Louisiana denied the petition for rehearing, thereby sustaining the validity of the statute as construed, enforced and applied by it. The federal question was thus properly raised and is properly before this Court for determination, and there is properly drawn in question the validity of the Louisiana statute as construed and applied by the Supreme Court of this State. It is conceded that the federal question is substantial. The construction and application of the statute as manifested by the decision, holding and judgment of the Supreme Court of Louisiana imposes a direct and undue burden upon interstate commerce in violation of Article I, Section 8, Cl. 3, of the Constitution of the United States.

Appellant was taken by surprise and raised the Federal question for the first time in its application for rehearing.

The trial court held in appellant's favor upon the claim here involved and construed the taxing statutes as levying an excise tax only on gasoline actually sold, used or consumed. It also construed the statute as allowing to the taxpayer a deduction equal to 3% upon the total quantity sold, used or consumed. In so holding the lower court followed an unbroken line of decisions in Louisiana which are to the effect that the tax is to be paid only on gasoline actually sold, used or consumed.

State v. *Johnson*, 173 La. 669, 138 So. 503, 506.
State v. *City of Monroe*, 177 La. 983, 149 So. 541.
State v. *Cedar Grove Refg. Co., Inc.*, 178 La. 810, 152 So. 531, 533.
State v. *Strother*, 179 La. 354, 154 So. 22.
State v. *Tri-State Transit Co.*, 179 La. 811, 155 So. 233.
State v. *Texas Co.*, 187 La. 287, 174 So. 359.
State v. *Standard Oil Co.*, 188 La. 978, 178 So. 601.

State of Louisiana v. *Standard Oil Co. of La.*, 190 La. 338, 182 So. 531.

Magnolia Petroleum Company v. *Hugh M. Wilkinson, et al.*, 21 F. Supp. 771.

Shell Petroleum Corp., Tex. Co. and Magnolia Petroleum Corp. v. *H. M. Wilkinson et al.*, 21 F. Supp. 780.

The Texas Company v. *Hugh Wilkinson et al.*, 21 F. Supp. 771.

In the last litigated case on the subject, namely, that of *State* v. *Standard Oil Company of Louisiana*, 190 La. 338, 132 So. 531, the Supreme Court of Louisiana was not called on to pass on the question of whether or not a tax was due immediately on the importation of gasoline, and in the instant case, *State* v. *Sinclair Refining Company*, 196 So. 349, reported in the Southern Reporter dated June 27, 1940, the Supreme Court of Louisiana said, after commenting on *State* v. *Standard Oil Company of Louisiana* (*supra*):

> "Evidently we failed, because there is still confusion and doubt. So, in order to remove doubt as to our interpretation of the meaning of the various provisions of all the statutes relating to the payment of the tax and the method of computing the amount of it, we now hold the 'dealers' (as defined in the acts) in gasoline or other motor vehicle fuel must pay the tax on the total gallonage manufactured or imported into this state for sale, use, or consumption therein, less the 3 per cent which the statutes allow dealers to deduct to cover their losses in handling such motor vehicle fuel. In other words, the dealers must pay the tax on 97 per cent of the total gallonage manufactured or imported into the state for sale, use, or consumption in the state, and not on the gallonage actually sold, used, or consumed.
>
> "We have reached this conclusion after a most careful study and consideration of each and every one of the so-called gasoline tax acts. It is true, we think,

as Judge Borah stated in his opinion in the case of Texas Co. *v.* Wilkinson et al., D. C., 21 F. Supp. 771, that some of the acts are not as artistically drawn as they might have been. The text of some of them is not free from all ambiguity. The meaning of some of the clauses is dubious."

Appellant had no way of anticipating that the Supreme Court of Louisiana would hold in the instant case that appellant would have to pay the tax on gasoline which it imported, and in effect overruled the decision in *State* v. *Standard Oil Company of Louisiana* (*supra*) which it had purportedly followed. The State admits that not a gallon of gasoline involved in this law suit was sold, used or consumed in the State of Louisiana. As heretofore said, in an unbroken line of decisions, the State had repeatedly held that the gasoline tax in Louisiana was an excise tax and only to be paid on sale, use and consumption. The decision in the present case has the effect of overruling the unbroken line of decisions and disregards entirely the administrative and departmental construction for a period of eleven years, which was given judicial approval by the Supreme Court of Louisiana (*supra*), and to say that appellant was surprised at the decision of the Supreme Court of Louisiana is to put it mildly.

The effect of the decision of the Supreme Court of Louisiana as applied to appellant was to tax not only 97% of the total gallonage manufactured or imported in the State for sale, use or consumption, but, in addition thereto, tax the gallons lost within the State out of the large quantity of gasoline imported into the State for interstate and foreign commerce and for sale and delivery to the United States Government. The Supreme Court of Louisiana placed an entirely new and different construction on the gasoline tax law.

This new and unforeseen construction of the gasoline tax law of Louisiana as applied to appellant denies to it the equal protection of the laws and deprives it of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States, and violates Article 1, Section 8, Cl. 3, of the Constitution of the United States, whereby Congress alone has the power to "regulate commerce with foreign nations and among the several States, and with Indian tribes."

The decision of the Supreme Court of Louisiana, changing the construction and application of the taxing statutes as aforesaid, drew in question the validity of such taxing statutes under the Constitution of the United States as aforesaid and likewise drew in question the rights and privileges guaranteed to appellant by the Constitution of the United States, and which decision could not prior thereto have been reasonably foreseen and anticipated by appellant. The taxing statutes as construed and applied by the trial court did not draw into question the validity of such statutes and the rights and privileges guaranteed to appellant by the Constitution of the United States were not infringed by the decision of the trial court and the trial court's construction and application of the taxing statutes.

The raising of a Federal question in a petition for rehearing does not come too late where the State court's ruling could not have been anticipated, and petition for rehearing presented the first opportunity for raising the Federal question.

Herndon v. *Georgia*, 295 U. S. 441.

The Federal question raised in a petition for rehearing does not come too late where the grounds of the original decision below supply a new and unexpected basis for the

claim, by the defeated party, of the denial of a Federal right.

Great Northern R. Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358.

The raising of the Federal question by assignment of error, even after the denial of a petition for rehearing in the highest court of the State, was permitted in *Saunders* v. *Shaw*, 244 U. S. 317, under a situation somewhat analogous to that in which appellant found itself in the instant case. This Court stated as follows:

> "The questions remain whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

In the case at bar the Supreme Court of Louisiana overturned the administrative construction of the statute in question, which construction had been followed and acted upon for 11 years, has in effect overruled the decision rendered in the case of *Standard Oil Company, supra,* and

has failed to recognize the decision rendered by the Federal court in the *Magnolia, Texas and Shell* cases, *supra*.

Appellant could in no way foresee the action of the Supreme Court of Louisiana and was not bound to anticipate that the taxing statutes would be construed in such a way as to create a direct and undue burden on interstate commerce and would be construed in a manner and way not put in issue by the pleadings in the trial court.

The case was decided by the trial court on a non-Federal question. The Federal question involving the commerce clause of the Constitution of the United States was first injected into the case by the decision of the Supreme Court of Louisiana. Appellant therefore seasonably presented the Federal question in its application for rehearing.

The case was decided by the trial court upon a non-Federal question. It might and should have been decided under the pleadings by the Supreme Court of Louisiana upon a non-Federal question. Under the decisions of this Honorable Court the question is properly presented here. The following is taken from the opinion of this Court in *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657 at 665.

> "The respondent insists that as the appellant joined the Equitable Company, surety on the refunding bond, as a defendant, it sought to take advantage of the amendatory act of 1929 and is now estopped to question the constitutional validity of the statute. Appellant replies that the suit went upon the theory adopted by the chancellor that the amendatory act was not retroactive so as to release the earlier bond but intended merely to substitute a refund-bond in the place of the funds retained by the Highway Commissioner which, under the original act, were also held for satisfaction of the appellant's claim. Such a construction of an act which had not been passed upon by any court was per-

missible, and, if, as now appears, the appellant was in error in so construing the act, the mistake cannot be made the basis of an estoppel. In both appellate courts the appellant insisted on its original view that the act of 1929 did not operate to discharge the obligation of the appellee's bond. The appellee asserted no estoppel in either of those tribunals. Not until the decision of the Supreme Court was there a holding that the act retroactively affected the enforceability of the bond. Not until then was there occasion for appellant to urge that, if so construed, the act would impair the obligation of the bond. As we have indicated, the record discloses that when this construction of the act appeared probable, the appellant promptly raised the constitutional question. It cannot be estopped so to do by its previous insistence upon a construction which would render the statute consistent with the act of 1917 and present no constitutional difficulty. The appellee says that estoppel, a non-federal ground, adequate to support the judgment, was in the case from its inception. The point was not made or considered in the state courts. The validity of the act was adjudged on the issue of impairment of the obligation of the appellee's bond. We do not, therefore, consider the defense of estoppel.

"The rule that when the decision of a state court may rest upon a non-federal ground adequate to support it, this Court will not take jurisdiction to determine the federal question, has no application where, as here, the non-federal ground might have been considered by the state court but was not."

This is the same view that was taken in *Grayson* v. *Harris*, 267 U. S. 352, 45 S. C. 317, wherein, at p. 319, the court held:

"Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that when the decision of a state court may rest upon a non-federal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where,

as here, the non-federal ground might have been considered by the state court but was not. Rogers *v.* Hennepin County, 240 U. S. 184, 188, 189, 36 S. Ct. 217, 60 L. Ed. 469; Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592, 608, 19 S. Ct. 533, 43 L. Ed. 823."

It has further been held by this Honorable Court that even though the Federal question involved might have been raised in the trial court, or in an intermediate court, but was not raised there because the rights of the parties, under the courts' decisions, were not infringed because of a holding in favor of the party raising the question, that the raising of the Federal question for the first time in a petition for reargument does not come too late. *Grannis* v. *Ordean,* 234 U. S. 335, 34 S. C. 779 at 782:

"There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court, upholding the notice, that first ran counter to the alleged Federal right. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the 14th Amendment. The Supreme Court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this Court. Mallett *v.* North Carolina, 181 U. S. 589, 592, 45 L. Ed. 1015, 1017, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leign *v.* Green, 193 U. S. 79, 85, 48

L. Ed. 623, 626, 24 Sup. Ct. Rep. 390; McKay *v.* Kalyton, 204 U. S. 458, 463, 51 L. Ed. 566, 569, 27 Sup. Ct. Rep. 346; Sullivan *v.* Texas, 207 U. S. 416, 422, 52 L. Ed. 274, 277, 28 Sup. Ct. Rep. 215; Kentucky Union Co. *v.* Kentucky, 219 U. S. 140, 158, 55 L. Ed. 137, 156, 31 Sup. Ct. Rep. 171."

In the case at bar the rights of appellant were not infringed, in respect to the Constitutional questions now under discussion, until the opinion and decree of the Supreme Court of Louisiana was rendered. Until that time the demands of the State for the taxes allegedly due under the taxing statutes had been denied.

Subsequent to the decision of the Supreme Court of Louisiana your appearer seasonably filed an application for a rehearing, presenting, among others, the Federal question under discussion.

The petition for rehearing was denied by the Supreme Court of Louisiana on May 8th, 1940, without the assignment of written reasons therefor.

A situation very similar to the case at bar was presented to the Supreme Court of the United States in *State of Missouri, ex rel. Missouri Insurance Co.* v. *Gehner,* 281 U. S. 313, 50 S. C. 326. In that case the question of whether certain United States bonds were subject to taxation, was raised. The first decision holding that such bonds were subject to taxation was in the highest court of the State of Missouri. Plaintiff therein then filed a petition for a rehearing on the ground that such a construction of the statute infringed its Constitutional rights. This Honorable Court said:

"It is well settled that this Court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily, it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied with-

out more. Citizens' National Bank *v.* Durr, 257 U. S. 99, 106, 42 S. Ct. 15, 66 L. Ed. 149. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the state the federal questions here presented, and is entitled to have them considered. Saunders *v.* Shaw, 244 U. S. 317, 320, 37 S. Ct. 638, 61 L. Ed. 1163; Ohio ex rel. Bryant *v.* Akron Park District, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. ——."

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 50 S. C. 451, involved a Federal question which was raised first on application for rehearing. In that case, which came up on a writ of certiorari to the Supreme Court of the State of Missouri, the Supreme Court of Missouri, which is the highest State court in Missouri, overruled a former decision rendered by it. The plaintiff filed a petition for a rehearing within the time allowed by law, and at that time raised the Federal question involved. The Court held that it had jurisdiction:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly

found powers of the commission, the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. Missouri ex rel. Missouri Ins. Co. *v.* Gehner, 281 U. S. 313, 50 S. Ct. 326, 74 L. Ed. ——."

Act 14 of the Second Extra Session of 1935 is unconstitutional and appellant has been injured by application of the act.

In Section 7 of Act 6 of 1928, as amended, which Act levies 4¢ of the gasoline tax, and in Section 7 of Article 6-A of the Constitution levying 1¢ of the gasoline tax, are contained identical provisions with reference to the enforcement and collection of the taxes levied. Both the Act and the Constitution provide in substance that when it shall appear to the Supervisor that any taxpayer shall have made an untrue or incorrect return the Supervisor shall—

(a) Correct the return;
(b) Compute the tax on the corrected return;
(c) Certify the corrected return to the Department as being the true amount due;
(d) Concurrently notify the taxpayer of the foregoing facts;
(e) In the event the taxpayer does not within 5 days after such notification make his own corrected return and pay the amount due the Supervisor may then enter suit against the taxpayer.

Instead of proceeding under the provisions above summarized the State brought this action under Act 14 of the Second Extra Session of 1935, alleging that the proceeding was a summary one providing for additional procedure to expedite the determination of all claims by and on behalf of the State for taxes, excises and licenses, and for penalties, interest and attorneys' fees thereon.

Appellant seasonably interposed its objections to proceeding with the suit in the form of exceptions filed with its answer raising questions of denial of equal protection and due process of law in violation of the 14th Amendment to the Constitution of the United States and Sections 2 and 6 of Article I of the Louisiana Constitution. These exceptions addressed themselves specifically to the harsh and unusual character of the legislation, a number of which are no longer tenable in view of developments in the course of this litigation, but there remain, however, the following valid constitutional objections all growing out of the failure of the State to observe the requirements of Section 7 of Act 6 and of Article 6-A of the Constitution.

Such failure has injured appellant and denied it due process of law and equal protection of the law in the following respects:

1. Appellant wholly lost the right to endeavor to convince the collector of the correctness of appellant's position, and 5 days' time within which to determine upon and act in accordance with such rights as may have been available to it;

2. Appellant wholly lost the right to pay and satisfy the State's claim exclusive of 10% attorneys' fees. That is to say, had appellant received the notice required and an opportunity for hearing it could have paid the amount demanded plus 20% penalty, but could have saved 10% attorneys' fees amounting to more than $10,000. This for the reason that the statute provides that once suit be instituted, then in addition to the 20% penalty there shall also be collected an additional 10% as attorneys' fees;

3. The institution of this summary action against appellant under the provisions of Act 14 of the Second Extra Session of 1935 operated to deprive appellant of its normal right to have a hearing before the Collector of Reve-

nue, and to have the case against it tried in accordance with normal procedure rather than under the harsh and unusual provisions of Act 14 involving heavily restricted provisions as to the time and method of pleading, denial of right to continuances, denial of right to new trial or rehearing, denial of the ordinary right to appeal devolutively from the judgment, denial of even a suspensive appeal except as a matter of discretion with the Court and upon giving bond in double the amount of the judgment instead of one and one-half times the amount of the judgment as provided under ordinary procedure; and imposed upon appellant the burden of proof and of overcoming an arbitrary statutory presumption.

Appellant, as a bonded dealer in gasoline in Louisiana, had posted with the State a heavy bond under the provisions of the gasoline taxing statutes, and in addition is a large property owner within the State. It, as well as other oil companies that operated in Louisiana, had paid its tax obligations in accordance with the requirements of the State for some 11 years. No reason appeared why there should be invoked against the appellant the unique and harsh provisions of Act 14. For example, it did not appear that the State's funds were jeopardized, that appellant was about to remove its property from the State, or that any other cause existed which might ordinarily warrant the invocation of summary remedies.

The Supreme Court of Louisiana has held that Act 14 is to provide additional procedure to facilitate and expedite determination of tax claims. This act creates no cause of action on behalf of the State. It is nothing but an ancillary remedy. Its language contains no outline of the terms, conditions or circumstances when it shall or may be invoked against a particular taxpayer. Thus the Collector of Revenue is vested with the arbitrary privilege of choosing the

procedure which he will use in each individual case with the result that one taxpayer may be granted the right to ordinary trial conducted within the discretion of the Court under the general rules of evidence and with the customary rights of appeal, new trial and rehearing, while another taxpayer in the same situation can be and appellant has been denied all those rights so essential to a full and impartial administration of justice, and has been compelled to carry the burden of proof and to overcome arbitrary statutory presumptions.

In the view of appellant Act 14 creates a presumption which is arbitrary and which operates to deny a fair opportunity to repel such presumption. The proceeding begins with a petition not verified as to the facts but verified only as to "The best of Affiant's knowledge or belief", not even upon information or belief. This petition constitutes full proof against the taxpayer and the burden rests "wholly on" the taxpayer to "Establish anything to the contrary." The taxpayer is not relieved from the obligation imposed under the general laws to answer that petition categorically and to deny or affirm any allegation of fact therein contained. The effect of the affidavit of the affiant on behalf of the State is "All of the facts alleged in said petition shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party." The record shows that appellant was required to carry this burden and the fact that it successfully discharged same in the eyes of the trial court did not then nor does it now render the imposition of the burden any the less improper in a constitutional sense. Here we have a case in which the Collector of Revenue failed to comply with the tax levying statutes to create any cause of action and might possibly have been unwilling to make the departmental certification required by statute, yet appellant was compelled

to assume the burden of proof based upon an affidavit of Counsel for the State which did not even purport to state that the affiant knew or had made any investigation whatever of the facts alleged.

Appellant insists that there is no logical connection or reasonable inference as to the truth of the allegations to be drawn from such an affidavit as provided for in Act 14 sufficient at least to make such allegations prima facie evidence and to cast the burden upon the defendant.

In *Western & A. R. Co.* v. *Henderson,* 73 L. Ed. 884, the question presented was whether the due process clause of the 14th Amendment was violated by a provision of the Georgia Civil Code, declaring that a railroad company should be liable for damages done to persons, stock or other property by the running of its trains, unless the company should make it appear that their agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. The court held the presumption raised by this provision was unreasonable and arbitrary and violated the due process clause of the 14th Amendment. The case was distinguished from that of *Mobile & K. C. R. Co.* v. *Turnipseed,* 55 L. Ed. 78, on the ground that, whereas in the *Turnipseed* case the statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence, the Georgia statute created an inference that was given effect of evidence to be weighed against opposing testimony and to prevail unless such testimony was found by the jury to preponderate. In discussing the question the court said:

> "Legislation declaring that proof of one fact or group of facts shall constitute prima facie evidence of an ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. A prima facie presumption casts upon the person against whom it is applied the duty of go-

ing forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. *Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property.* Manley *v.* Georgia, 279 U. S. 1, ante, 575, 49 Sup. Ct. Rep. 215, and cases cited. • • • That of Georgia as construed in this case creates *an inference that is given effect of evidence to be weighed against opposing testimony and is to prevail unless such testimony is found by the jury to preponderate.*"

In *Manley* v. *Georgia,* 73 L. Ed. 575, this Court again struck down a statute creating an arbitrary presumption. The Georgia statute provided that every insolvency of a bank should be deemed fraudulent, and should subject the directors to imprisonment, unless they repelled the presumption of fraud by showing that the affairs of the bank had been fairly and legally administered. The bank was deemed to be insolvent when it could not meet its liabilities as they became due in the regular course of business. It was held that the presumption created did not rest upon any definite basis, being raised upon proof of any one or more of the conditions described as insolvency and without regard to the facts from which such condition resulted. Mere legislative fiat, the court held, may not take the place of fact in the determination of issues involving life, liberty or property, and it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.

See also:

Bandini Petroleum Co. v. *Superior Court of the State of California,* 284 U. S. 8, 76 L. Ed. 136; and

Morrison v. *California,* 291 U. S. 82, 78 L. Ed. 664.

Thus, here legislative fiat has taken the place of fact, and a citizen has been unlawfully and unjustly deprived of his property.

A reading of Act 14 would seem to show that its remedies are to be availed of if and when some taxes have become due under some statute levying taxes; that is when the cause of action for taxes shall have theretofore accrued. It is pertinent here to point out that no cause of action for taxes has accrued against appellant and could not under the provisions of Act 6 of 1928 as Amended, and under Article 6-A of the Constitution unless and until the provisions of Section 7 of the Act and the Constitution has been complied with by the Collector of Revenue. Thus the application of Act 14 to appellant operated to deny it of valid and sufficient defenses which it might have interposed in any action brought in ordinary litigation.

The testimony of the State's witnesses shows that the conditions specified in Section 7 of Act 6 and of Article 6-A of the Constitution were not complied with. Appellant respectfully contends that the foregoing results flow as a matter of law from such failure.

The State in that portion of its statement opposing jurisdiction dealing with Act 14 relies upon the decision in the case of *State* v. *Standard Oil Company*, 188 La. 978, 178 So. 601, but in that case the Collector of Revenue had complied with the provisions of Section 7 of Act 6 of 1928, as amended, and Section 7 of Article 6-A of the Louisiana Constitution, so that the issues here raised were not presented or decided by the Supreme Court of Louisiana in the cited case.

It is contended by appellee in its motion opposing jurisdiction that the constitutional objections here urged were not pleaded by appellant in the trial court and that such constitutional objections are therefore waived and cannot now be considered by this Court. We believe from what we

have already said it is apparent that the constitutional questions were properly and seasonably raised in the Louisiana court and are properly before this Court for determination. If, however, it should be said that the failure to plead and sooner raise the constitutional questions constitutes a waiver of appellant's rights, then we say that such a waiver predicated upon the harsh summary proceedings invoked operates to deprive appellant of due process of law. In the very nature of the proceeding and the rapid steps required under the statute a reasonably diligent attorney could not have, in the very nature of things, presented within the limited time the constitutional questions involved, particularly in view of the nature of appellee's allegations. If the failure to plead such constitutional defenses constitutes a waiver of those defenses under the circumstances, then clearly Act 14 upon which such waiver is predicated operates to unconstitutionally deprive this appellant of its property without due process of law in violation of the Constitution of the United States.

Appellant does not maintain that the State may not provide as many means of procedure for collection of taxes and excises as it shall deem proper, but does assert that in providing several remedies which vary in the restriction of rights and the imposition of burdens upon the parties proceeded against, such acts shall and must undertake to establish standards under which they may be invoked and must ordinarily require that the same remedies shall be invoked against taxpayers similarly circumstanced, rather than leaving to the arbitrary discretion of the law enforcement officers the choice of remedies under circumstances such as exist in this case.

Conclusion.

Appellant respectfully prays that this Honorable Court sustain jurisdiction of this cause and overrule and deny the

statement of appellee opposing jurisdiction and its motion to dismiss.

Respectfully submitted,

ROY T. OSBORN,
V. R. TOMLINSON,
ALFRED MCKNIGHT,
WILLIAM A. PORTEOUS, JR.,
F. CARTER JOHNSON, JR.,
Attorneys for Appellant.